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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 24

NANCY K. McFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16–29) is reported in 29 B. T. A. 998. The *per curiam* opinion of the Circuit Court of Appeals (R. 56) is reported in 74 F. (2d) 1017.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 10, 1934. (R. 57.) A petition for rehearing filed January 4, 1935 (R. 58–63), was denied January 18, 1935 (R. 64). The peti-

tion for a writ of certiorari was granted May 20, 1935. (R. 65.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner on December 19, 1929, sold stock which she had received, pursuant to a gift from her mother in August, 1925, of 10 percent of the latter's statutory one-half interest in the estate of her deceased husband, upon a distribution of the estate on November 3, 1927. The decedent, the original owner of the stock, died on June 28, 1919. Was the stock "held" by the petitioner for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101, Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 36–42.

STATEMENT

The facts were stipulated (R. 34–38) and may be summarized as follows:

The petitioner is the daughter of Martha A. Given, who is the widow of T. H. Given, deceased. T. H. Given died testate on June 28, 1919, leaving his widow and no issue. The will of the decedent, filed and probated in Allegheny County, Pennsylvania, on July 3, 1919, made no provision for his widow. On July 3, 1919, the executors of the es-

tate duly qualified and the widow filed with the executors her written election under the laws of Pennsylvania to take against the will one-half of the decedent's estate in lieu of dower. One-half of the estate was duly awarded to the widow by the Orphans' Court of Allegheny County, under the laws of Pennsylvania. Audit of the first partial account of the executors, filed in July, 1923, was continued, as all debts of the estate were not paid and the estate was not fully administered. (R. 34–35.)

In June, 1924, Mrs. Given assigned 10 percent of her one-half interest in the decedent's estate in trust for Mrs. Nancy K. McFeely, the petitioner, and on March 16, 1925, Mrs. Given reported the gift and paid the gift tax thereon. (R. 35.)

Pursuant to an order of the Orphans' Court dated May 20, 1925, entered upon audit of the second partial account of the executors filed March 6, 1925, the trustee of Nancy McFeely, the petitioner, received 900 shares of American Window Glass Machine Company common stock on a partial distribution of the estate, the parties in interest having elected to accept distribution in kind. The remaining assets of the estate were held by the executors pending settlement of a state tax claim and further distribution was suspended until the filing of a final account. (R. 35–36.)

On August 1, 1925, the gift by Mrs. Given of 10 percent of her interest in the estate in trust for Nancy McFeely was made absolute by duly exe-

cuted instruments, the validity of which was thereafter recognized by the Orphans' Court. (R. 36.)

Upon a further distribution of assets of the decedent's estate ordered November 3, 1927, the petitioner received, among other assets, 1,000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Company common stock. On March 14, 1929, the petitioner sold the Radio stock for $484,460, such stock having been valued at $20,625 as of June 23, 1924, for purposes of the gift tax paid by Mrs. Given in 1925 on the gift of ten percent of her interest in the estate to her daughter. On December 19, 1929, the petitioner sold the 1,050 shares of Window Glass Machine Company stock for $19,950, such stock having been valued at $89,100 for gift tax purposes, showing a net loss of $69,150. (R. 37.)

On her 1929 income tax return, filed in March, 1930, the petitioner reported as "capital net gain" a net profit of $394,685 from the sale of the 1,000 shares of Radio stock and the 1,050 shares of American Window Glass Machine Company stock, based upon the value thereof as of June 23, 1924, on the assumption that the stock was acquired by her on the date of the gift by her mother to her. (R. 37.)

The Commissioner, respondent, determined that there was a capital net loss of $64,223.25, instead of $69,150, on the sale of the American Window Glass Machine Company stock, based upon the value thereof at the date such stock was distributed

to the taxpayer, 900 shares on May 20, 1925, and 150 shares on November 3, 1927. The Commissioner further determined that there was "an ordinary profit" of $404,085 on the sale of the Radio stock, instead of a "capital net gain" of $463,835 as claimed by the petitioner, based upon the value thereof at the date of distribution to the petitioner, November 3, 1927. The Commissioner thereupon asserted a deficiency in tax for 1929 of $35,372.53, arising principally from the determination of an "ordinary net profit" rather than "a capital net gain" on the sale of the Radio stock. (R. 38.)

The Board of Tax Appeals sustained the determination of the Commissioner (R. 29) and the Circuit Court of Appeals, upon the petitioner's petition for review, affirmed the Board of Tax Appeals (R. 56–57). The only issue raised in the court below and in this Court is whether the profit on the sale of Radio stock is ordinary net income or a capital net gain. (R. 30–33; Pet. 10–11.)

SUMMARY OF ARGUMENT

Section 101 (c) (8) of the Revenue Act of 1928, *infra*, defines the term "capital assets" as "property held by the taxpayer for more than two years," with certain exceptions which are not here material.

In this case the petitioner actually held the stock which she sold in March, 1929, from the time it was distributed to her. She received the stock through her mother by intestacy upon distribution

of assets of the decedent's estate on November 3, 1927. Hence if the word "held" is given its ordinary meaning in Section 101 (c) (8), and is construed independently of related sections in the statute (as the petitioner claims it should), the stock which the petitioner sold had not been held for more than two years at the time of sale and the gain arising from the sale may not be taxed as a capital net gain under Section 101. But we do not agree that Section 101 should be construed independently. This Court has held that the corresponding section of an earlier statute must be construed in conjunction with the section prescribing the basis for determining gain or loss and where the vendor of property acquired property by gift and was required to use the donor's basis for measuring gain, that he should be treated as having held the property during the donor's tenure for the purpose of the capital net gain provision.

It was held by this Court that the date established as fixing the basis for computing the gain is likewise the date which marks the beginning of the holding period in ascertaining the rate of tax to be applied to the gain. Under Section 113 (a) (5) of the Revenue Act of 1928, *infra*, the petitioner is required to use as a basis for measuring gain the fair market value of the property at the time of distribution, whereas her predecessor in title (for purposes of this case, the estate) was required to

use the fair market value at the time of death. Inasmuch as the petitioner is not treated as having held the property for the time that the estate held it for the purpose of measuring the gain, she should not be treated as having held it for the period of the estate's tenure for the purpose of fixing the rate of tax applicable to that gain. The date of distribution being established as fixing the basis for computing the gain on the sale, the same date must be used to fix the holding period in ascertaining the applicable rate of tax.

This conclusion is supported by Section 101 (c) (8) (B), which specifically provides that where the successor is required to use the predecessor's basis, the tenure of the predecessor shall be included in determining whether the successor has held the property for two years. The inference is clear that if the successor is not required to use the predecessor's base, he may not add his tenure.

Decisions construing the word "acquire" and "time of acquisition" under other statutes do not aid the petitioner's case. Congress had the power to say that the basis for measuring gain from the sale of personal property (other than that received by specific bequest) should be the fair market value of the property at the time of distribution, that for income tax purposes the property will be deemed acquired in cases of this kind when distributed, regardless of local rules of property. It has said so in Section 113 (a) (5) of the statute here in-

volved and that provision must be given effect in the definition of "capital assets" in construing Section 101 (c) (8).

The decision of the Circuit Court of Appeals is correct.

ARGUMENT

PETITIONER HAVING RECEIVED STOCK BY GIFT FROM HER MOTHER, WHO ACQUIRED THE SAME BY INTESTACY, SUCH STOCK WAS HELD ONLY FROM THE DATE OF DISTRIBUTION, LESS THAN TWO YEARS FROM THE SALE THEREOF, AND THE GAIN THEREFORE IS NOT A CAPITAL NET GAIN

The Circuit Court of Appeals, affirming the Board of Tax Appeals *per curiam,* held in effect that the 1,000 shares of Radio stock sold in March, 1929, were held by the petitioner, within the meaning of the statute, only from the date of distribution thereof by the executors of the decedent's estate, November 3, 1927, a period less than two years, and accordingly the profit thereon may not be taxed as a "capital net gain" but is taxable as ordinary net income. We submit that the decision below is correct.

The petitioner contends that since under the laws of Pennsylvania the interest of her mother in the estate vested at the date of decedent's death, June, 1919, and the stock in question was acquired by gift from her mother, such stock was held by the taxpayer under the statute (Sections 101 (c) (8) (B) and 113 (a) (2), *infra*) from 1919. (Br. 22.) The petitioner further contends that the stock was held by her in any event from the date of the gift from

her mother. (Br. 46.) Hence, it is argued that in either case the stock was held for more than two years and the profit on the sale thereof is taxable as capital net gain under the statute. The Commissioner contends that since the petitioner's mother under the Revenue Act of 1928 could not have acquired the stock, for income tax purposes, prior to distribution of the same by the estate of the decedent on November 3, 1927, the petitioner did not acquire such stock pursuant to the gift from her mother until that date, so that the stock was held by the petitioner for less than two years at the time of sale and the profit realized is not taxable as capital net gain, but is ordinary net income taxable at the usual rates.

Section 101 (c) (8) of the Revenue Act of 1928, *infra,* provides that at the election of the taxpayer the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included the period for which the property was held by any other person if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. (Subdivision (c) (8) (B),

infra). Section 113 (a) of the Revenue Act of 1928, *infra*, so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under Subdivision (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estate from the decedent, is the value thereof at the date of decedent's death. In all other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer.*

The stock here in question was received by the petitioner pursuant to a gift from her mother on August 1, 1925,[1] of 10 percent of the latter's interest in her deceased husband's estate. The mother, however, had only a one-half interest in the de-

[1] While the petitioner's mother originally transferred 10 per cent of her interest in the decedent's estate on June 23, 1924, in trust for the benefit of the petitioner, the trust was cancelled and the gift was made absolute on August 1, 1925. If the date of gift is determinative, it is immaterial upon which of these dates the gift is considered as made. Accordingly, the date the gift was made absolute will be referred to herein as the date of the gift. In our view, however, the date of gift is not controlling or even material here.

cedent's estate, which she took, by virtue of her election, under the laws of Pennsylvania and against the will, no provision for her having been made by the decedent in his will. Accordingly, the mother's interest in the estate came to her and was acquired by intestacy (*Shestack's Estate,* 267 Pa. 115; *Evans's Estate,* 150 Pa. 212, 218; *Greiner's Appeal,* 103 Pa. 89; Bouvier's Law Dictionary (Rawle's 3d Ed.), Vol. 1, p. 1679; Black's Law Dictionary (3d Ed.), p. 1003) and the basis for gain or loss of personal property so acquired by the mother would be the value thereof at the date of distribution. (Section 113 (a) (5), *infra.*) The stock here in question was personal property and in the hands of the mother the basis is the value thereof on November 3, 1927, the date of distribution. The stock having been acquired by the petitioner by gift the basis in her hands also is the value at the date of distribution. (Section 113 (a) (2), *infra.*) If, as the petitioner contends, the stock was acquired and held by her at the time of the gift although not then received, the two year period of the statute would be satisfied without regard to the holding period of the mother. But obviously the petitioner did not acquire and hold this stock prior to the date it was acquired and held by her mother, from whom she received it by gift. If, as we contend, this stock was not acquired and held for income tax purposes, within the meaning of the Revenue Act of 1928, by the mother until the date of

distribution, because she acquired the same by intestacy, it follows that the petitioner did not acquire and hold the stock until that date. The gift made in 1925 was of a portion of an inchoate and indeterminate interest and not of the Radio stock or any other specific property; indeed, at that time the mother had no specific property to give. Hence, it is immaterial that the gift of the undetermined interest was made more than two years prior to the sale of the Radio stock, for the gift could not be effective as to such stock until it was acquired by the mother, the donor. The petitioner stands in no better position than her mother or than if she had acquired the stock by intestacy rather than by gift. The result in this case is the same if the petitioner in fact acquired the property by intestacy directly from the decedent's estate rather than by gift from her mother, who acquired the same by intestacy, and accordingly, for the purpose of this discussion the gift may be ignored.

The stock in question was acquired by the petitioner through her mother by intestacy and was distributed to her on November 3, 1927, under a decree of distribution. The stock was sold on March 14, 1929. It seems clear that if the word "held" is used in its literal and obvious sense in Section 101 (c)(8) and if that section is to be construed independently of related sections of the statute, the stock in this case was "held" by the petitioner considerably less than two years before

its sale. One cannot be said to hold property until it has been received or is in his grasp. As commonly understood to hold something, specific property, implies the ability or capacity to turn it loose. The petitioner could not prior to November 3, 1927, the date of distribution, turn loose the Radio stock for she did not have it and could not know that she would have it until that date. Hence, we suggest that if the petitioner's contention, that Section 101 is a wholly independent provision, were correct, we believe the Court would be bound to conclude that the stock was not a capital asset as defined in Section 101. A word is to be given its generally accepted meaning in the construction of a statute. *New Colonial Co.* v. *Helvering*, 292 U. S. 435. Construed independently of the provisions relating to a determination of gain or loss, there would be no reason to construe the word "held" as being used in anything other than its ordinary sense of being possessed. See definition of "hold" in Webster's New International Dictionary. In *Rufus R. Rand, Jr.* v. *Commissioner* (C. C. A. 8th), decided August 13, 1935, not yet reported but may be found in C. C. H., 1935, Vol. 3–A, p. 10, 351, it was said (p. 10,355):

> While we are convinced that section 101 should be construed in the light of section 113, yet the result would be the same if section 101 were alone considered for then the language there used would govern and that language clearly limits "held" to the period

after distribution (*Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 463, 464, 465).

We do not agree, however, that Section 101 (c) (8) may be construed independently. We submit that it must be construed in conjunction with Section 113 (a) (5) of the same Act, which provides that the basis for measuring gain or loss of personal property acquired by will or intestacy in all cases, other than specific bequests, shall be the value thereof at the time of distribution of such property to the taxpayer. The petitioner concedes that for the purpose of determining the amount of gain on the sale, the basis is the value of the stock at the time of distribution (Br. 57), but she contends that the establishment of such basis has no relation to the time of acquisition and the period of holding such property. The argument is that since under the earlier Revenue Acts fixing value at the date of acquisition as the basis for property acquired from a decedent such property was held to have been acquired at the date of death (*Brewster* v. *Gage*, 280 U. S. 327) and such property was deemed held from that date, within the definition of "capital assets," the meaning of "capital assets" remains the same under the Revenue Act of 1928, because the definition of that term was reenacted without change. Such a contention is wholly without merit. "Capital assets" are defined in the earlier Acts, as well as the 1928 Act, as "property held for more than two years," but the statute does

not undertake to define the word "held" or fix independently in the definition of "capital assets" the date from which property is held. Under the earlier statutes confusion arose as to the meaning of the general language, "date of acquisition," employed in fixing the basis of property acquired from a decedent by general and residuary legatees. It was to settle this confusion that Congress in the 1928 Act, adopted prior to the decision in *Brewster* v. *Gage, supra,* specifically fixed, without regard for technical rules as to the vesting of title, the dates of acquisition for income tax purposes of property acquired from a decedent in various ways. Section 113 (a) (5), *infra,* in fixing the date of distribution as the basis of property acquired from a decedent by will, other than specific bequests, and by intestacy, plainly establishes that date as the time of acquisition of the property for income tax purposes. (See S. Rep. No. 960, 70th Cong., 1st Sess., p. 26, *infra.*) Clearly it was within the power of Congress to fix the date of acquisition of property for income-tax purposes, regardless of local rules of property. *Taft* v. *Bowers,* 278 U. S. 470; *Burnet* v. *Harmel,* 287 U. S. 103; *Dibblee* v. *Commissioner,* 75 F. (2d) 617 (C. C. A. 9th), petition for rehearing denied September 6, 1935. See also, *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110; *Weiss* v. *Wiener,* 279 U. S. 333. Hence it is immaterial when the property in cases of this kind may be considered under local law to have vested in the tax-

payer. *Brewster* v. *Gage, supra,* plainly recognized the subject as one controlled by the Federal revenue laws. The statute having prescribed what shall be deemed the date of acquisition of personal property by a residuary or general legatee or by intestacy for determining the amount of gain taxable, we submit the date of acquisition remains the same in determining the period such property is held and the rate of tax applicable to the gain realized. In any case it seems plain that Congress, in establishing the date of distribution for valuation as the basis for determining the gain on a sale of personal property acquired by intestacy, certainly intended that the same date should measure the period such property was held by the taxpayer as determinative of the rate of tax to be applied to the gain. Under the statutes prior to the 1928 Act the date established for the basis of such property also fixed the holding period of such property, and when Congress changed the date for basis without altering the general definition of "capital assets" to establish independently the beginning of the holding period, it must have intended that the date for both purposes should continue to be the same under the 1928 Act as it was under the prior statutes. Accordingly, Sections 101 (c) (8) and 113 (a) (5), being included in the same Act and applicable to different elements of the same or like transactions, must be read together in determining the date the petitioner acquired the stock in ques-

tion and the period such stock was held by the petitioner.

This view is directly supported by *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, affirming 68 F. (2d) 19 (C. C. A. 2d), where it was held that the section of the 1921 Act prescribing the basis of property acquired by gift must be construed with the section of the same Act defining a capital gain, and that since under the Act the donee was required to use as his basis the basis of the donor, he should be considered for capital gain purposes as having "held" the property for the period it was held by the donor. In that connection this Court said (p. 467):

> Sections 202 (a)(2) and 206 (a)(6) are included in the same Act and are applicable respectively to different elements of the same or like transactions and *are not to be regarded as wholly unrelated.* (Italics supplied.)

In the same connection the Circuit Court of Appeals in that case said (p. 20):

> The upshot of the two sections, read as the Board reads them, is to treat the donee, for the purpose of computing his income, as holding the property during the period of the donor's tenure; but for the purpose of finding the rate at which that very income is to be taxed, as holding it only from the time when he gets it. The periods are tacked to establish his "capital assets", and divorced to tax them; he gets all the burdens and none

of the benefits; and while it is of course theoretically possible that Congress meant to do this, it is hardly more. We do not think that we do too much violence to the word by so declaring. Though the donee has not literally "held" the property for two years, he is treated as though he had; his acceptance of the gift is regarded as a vicarious substitution of himself for the donor. Only so, can he become subject to a tax upon the whole appreciation "realized" by his sale, part of which is otherwise wholly foreign to him. All we have to do is to carry over that substitution into section 206 (a)(6); that is, to read the two sections together. In so doing we merely carry forward and make comprehensive the purpose of section 206 (c) itself, which was to avoid the "freezing" of property because of high surtaxes. Report of Ways & Means Com. on House Rep. 8425, House Rep. 350, 67th Cong., First Session, p. 10. The classic instance of such a treatment of a statute is *Holy Trinity Church* v. *United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226. We do not forget that courts must not make law, but only declare it; but there is no vade mecum to guide us between a sterile literalism which loses sight of the forest for the trees, and a proper scruple against imputed meanings for which the words give no warrant. That there comes a point at which we must be content to treat the purpose as ineffectively expressed, we readily agree, though no one

> ean fix it a priori. But that does not absolve us in a given case, and here we find no sufficient obstacle in the language used; rather we think the generative purpose can infuse it.

That case holds that the date fixed for ascertaining the basis for determining gain must also be used in finding the rate of tax to be applied to the gain, that is, in determining the period the property was held. There, under a statute requiring the donee of property to use the basis of the donor for computing the amount of gain but not specifically providing for the inclusion of the donor's tenure in reckoning the period of holding by the donee for capital gain purposes, it was held that the two related provisions must be read together and since the donee is taxed on the gain accrued over the entire period from the date of the donor's acquisition, thus treating the property as then acquired by the donee, the property will be deemed to have been held by the donee for the same period. In the instant case the applicable provision of the statute directs that the basis of property acquired by intestacy shall be the value thereof when distributed to the taxpayer, not the basis in the hands of the decedent or any other basis, but the related section defining capital gains does not itself fix the date of acquisition of such property for the purpose of determining the period of holding by the taxpayer. Applying the rule of the *N. Y. Trust Co.* case, it

must be concluded that Congress did not intend that the date of distribution should be used in fixing the basis for gain, or should be considered the date of acquisition for basis purposes, and at the same time treat the property as having been held by the taxpayer from the time of the decedent's death for the purpose of determining the rate at which that gain should be taxed. If, as the *N. Y. Trust Co.* case holds, the date of acquisition of property for purposes of determining the period of holding and the rate of tax is the same as that prescribed for the purpose of determining the amount of taxable gain, or in other words, the period of holding for rate purposes is co-extensive with the period of accumulation of the gain to be taxed, it is clear that the petitioner held the stock in question only from the time of distribution to her, less than two years. The fortuitous circumstance that in the instant case the tenure is shortened and in the *N. Y. Trust Co.* case the holding period was extended does not affect the principle involved.

The conclusion that the holding of property acquired by intestacy dates, under the Revenue Act of 1928, only from the time of distribution is further supported by the fact that Congress specifically provided for the situations in which the tenure of a predecessor was to be added to that of the successor for the purpose of determining whether the successor had held the property the requisite two years, whereas that was not true under the Revenue Act of 1921, involved in the *N. Y. Trust Co.* case.

Section 101 (c) (8) (B) of the Revenue Act of 1928, *infra*, provides:

> (B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

We submit that since Congress specifically provided that where the succeeding owner was required to use the same basis as his predecessor, the tenure of both should be added in determining whether the two-year requirement was satisfied, it obviously meant that in cases where the successor did not use the same basis the successor's tenure alone should be regarded. In this case although the petitioner, having acquired the stock by gift, is entitled to include in her holding period the tenure of the donor, as we have pointed out that fact is immaterial, for under the circumstances of this case, the donor having acquired the property by intestacy, her tenure in nowise enlarges the holding period of the petitioner. The result in this case is the same as if the petitioner acquired the stock directly by intestacy. In that view the petitioner's predecessor was the decedent's estate, or the executors thereof, and she was not required to use the

same basis as such predecessor.[2] Hence, only her own tenure may be considered. Construed otherwise, Section 101 (c) (8) (B) would be meaningless.

This construction of the statute, approved by the court below, is in accord with *Rufus R. Rand, Jr.* v. *Commissioner, supra; Ogle* v. *Helvering*, 77 F. (2d) 338 (C. C. A. 2d); *Dibblee* v. *Commissioner, supra.*. In the *Rand* and *Ogle* cases petitions for certiorari are now pending, Nos. 439 and 137, October, 1935, Term.. In the *Rand* case the Circuit Court said (p. 10,353):

> Taking up next whether section 113 is so related in its subject matter to section 101 that they should be construed together. This question seems directly determined by *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, when considered in connection with the situation here. * * *
>
> Here there is a clear relation between section 113 and section 101. Both deal with taxation of gains derived from sales of property. The former determines the measurement of such gains for all income tax purposes, irrespective of rate of taxation to be applied. Such measurement required a statement, in general or particular terms, of the base value date and such dates are stated

[2] The executor uses the fair market value of the stock as of the date of death of the decedent under Section 113 (a) (5). See also, *Anderson* v. *Wilson*, 289 U. S. 20; *Commissioner* v. *Stearns*, 65 F. (2d) 371 (C. C. A. 2d), certiorari denied, 290 U. S. 670.

therein as to various situations. Section 101 is a rate of tax provision applicable to the taxable sale gains as measured in 113. Section 101 required a prescribed holding period to make its privileges available to the taxpayer—obviously, any holding period must have a legal beginning or base value date. Thus the situation is that of a taxable gain measure base value date (Section 113) and a tax rate base value date (Section 101) upon the gain so measured—both applying to the same character of gain, to-wit, from sales of property. Clearly the two are closely related and there should be no construction as to this date in 101 without regard to 113.

In the *Ogle* case the court said (p. 339):

> The word "held" is indeed colloquial; we need not say that it always implies possession; it does not. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361; *Commissioner* v. *Nevius*, 76 F. (2d) 109 (C. C. A. 2). But in this context we think it does. Otherwise we should have to say that between the intestate's death and distribution the administrator and the next of kin both "held" the personalty. * * * Moreover, in general the statute makes the time at which the "basis" is fixed, the starting point of the period which determines the privilege. So strong is this as even to control the term "held," when its natural meaning is otherwise. *Helvering* v. *New York Trust Co., supra.*, 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361. Here we need do no

violence to that word in order to conform with the general plan; rather we should have to wrench it unduly to do anything else. Finally, the privilege is in any case a partial exemption, and the taxpayer must bring herself clearly within it.

The argument of the petitioner is based almost entirely upon the assumed premise, for which *Brewster* v. *Gage, supra,* is cited as authority, that the residuary legatee or heir necessarily acquires personal property from a decedent at the time of death and *holds* such property from that time. The premise with so broad and universal an application is fallacious and the argument founded thereon is unsound. It may be true that, generally, in law the title to personal property acquired by a general or residuary legatee or by intestacy relates back and takes effect *as of the date* of the decedent's death, but the fact remains that the legal title does not actually vest until distribution and as a practical matter a general legatee or heir, unlike a specific legatee or devisee, acquires no particular identified personal property of a decedent's estate until distribution. Prior to that time he has only a right to his share of the personal estate remaining for distribution and although upon distribution his title relates back and takes effect as of the date of death he does not hold any specific personal property until it is distributed to him.

Brewster v. *Gage, supra,* does not support the position urged by the petitioner. That case must

be read in the light of the facts presented and the statutes involved. The Court was there concerned with the basis for determining gain or loss on property sold by a residuary legatee within the meaning of the Revenue Acts of 1918 and 1921. The 1921 Act, which was not materially different from the 1918 Act, provided, generally, that the basis for gain or loss of property acquired by bequest, devise, or inheritance, should be the value thereof at the time of such acquisition. The Court specifically recognized that the title to the personal property belonging to the decedent vested at death in the executors as trustees, but also noted that the legatee's right to have his share of the residue delivered to him later also vested immediately upon the decedent's death and the legal title which he *subsequently acquired* upon distribution related back to the time of death. Accordingly, the Court, construing the general phrase of the statute, "at the time of such acquisition", held in the absence of an express statutory provision to the contrary that the property was acquired at the date of the decedent's death.

The Court expressly recognized, however, that there was a different rule under the Revenue Act of 1928. The taxpayer there sought to have retroactive effect given to Section 113 (a) (5) of the Revenue Act of 1928. This was denied, but in its opinion, the Court, speaking of that section of the 1928 Act, said (280 U. S. at 337):

> The Revenue Act of 1928, § 113 (a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed the fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819. The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160, 162, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes.

The language of the Court points out the intention of Congress to change the law and determines that Section 113 (a) (5), Revenue Act of 1928, expressly fixed the fair market value at the time of distribution to the taxpayer as the basis for personal property passing by general bequest or by intestacy.

The failure of the petitioner to recognize the true effect of this fundamental difference between the Revenue Act of 1928, which is controlling here, and the 1918 and 1921 Acts considered in *Brewster* v.

Gage, supra, may account for her mistaken reliance upon that case.

Indeed, *Brewster* v. *Gage, supra,* although relied upon by the petitioner, directly supports the position of the respondent. Read in the light of the statutes involved and the recognition of the change in the applicable provisions made by the statute here involved, that decision holds in effect that *in the absence of a provision to the contrary* a residuary legatee acquires property at the date of the decedent's death. The plain and inescapable inference from the decision is that where the statute specifically prescribes the value of property at the time of distribution as the basis for measuring gain or loss such property is considered as acquired by the taxpayer at the same time. And having declared when the property is to be treated as acquired, the date of acquisition remains the same for the purpose of determining the period of holding and the applicable rate of tax as well as for the purpose of measuring the gain to be taxed. It is not logical to presume that Congress deliberately fixed a date for determining the basis of property wholly without regard for the date when the two-year holding period should begin. Every consideration of consistency, logic, and reason requires that the two dates coincide; no reason has or can be suggested why they do not coincide.

The Circuit Court of Appeals for the First Circuit in *First Nat. Bank of Boston* v. *United States,*

76 F. (2d) 200, and *Lee* v. *Commissioner*, 76 F. (2d) 203, held contrary to the position of the Commissioner and the decisions of the Second, Third, Eighth, and Ninth Circuit Courts of Appeals in the *Ogle, Rand, Dibblee* and instant cases. We respectfully submit that the decisions of the Circuit Court of Appeals for the First Circuit are erroneous for the following reasons:

(1) The court misunderstood the theory of the Government's case. The Government contended that Section 101 (c) (8) and Section 113 (a) (5) of the Revenue Act of 1928 must be read together and in so doing the intention of Congress that the two-year holding period of a general or residuary legatee should begin at the date of distribution is clear. It was not the theory of the Government as the First Circuit stated (p. 201) that a legatee acquires title from the executor: The Government's position was that legal refinements as to the vesting of title were immaterial.

(2) The court was led into error through its misconception of the holding and import of *Brewster* v. *Gage, supra,* when it failed to note that this Court there clearly pointed out that the law was changed by Section 113 (a) (5) of the Revenue Act of 1928. The court erroneously refused to recognize and give effect to this change in the law and the manifest intent of Congress. S. Rep. No. 960, 70th Cong., 1st Sess., p. 26.

(3) The court ignored the established rule of statutory construction, recently recognized by this

Court in *Helvering* v. *N. Y. Trust Co., supra* (p. 464), that the strict letter of a statute cannot be permitted to defeat the clear legislative intent and purpose.

(4) The court ignored the ruling in *Helvering* v. *N. Y. Trust Co., supra,* that the provision defining capital assets and the provision fixing the basis are applicable to different elements of the same or like transactions and must be read together.

Section 101 (c) (8) provides generally that property must be held by the taxpayer for more than two years to be a capital asset. It then provides a number of exceptions to the rule, none of which are material to this case, as we have pointed out above. The incorporation in these exceptions of subdivision (B) relating to cases where the successor is required to use the predecessor's basis makes it impossible to construe Section 101 independently of Section 113, as the petitioner seeks to do, and indicates that Congress meant for the successor not to have the benefit of the predecessor's tenure when he was not required to use the predecessor's basis.

That conclusion is fortified when we turn to Section 113 (a)(5), which makes the basis the time of distribution. If the petitioner is treated as having held the stock in question only from that date for the purpose of measuring the gain, she must be treated as having held it only for the same period for the purpose of determining her tenure under the capital gain provision, since the two provisions

are related. See *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121; *Helvering* v. *N. Y. Trust Co., supra; Hellmich* v. *Hellman*, 276 U. S. 233.

We do not see that this construction violates any rule of construction cited by the petitioner, or that the statute should be construed otherwise to avoid what the petitioner terms absurdities, discriminations, and injustices. The anomaly suggested by the petitioner (Br. 44–45) that under the view here urged, the longer she held the stock, the shorter the period of her holding, loses all significance when it is recalled that entirely different statutes were in effect and controlled the transaction on the respective dates of sale suggested. If the sale had been made on the earlier date the Revenue Act of 1926 would have governed, whereas the sale actually made on the later date is controlled by the Revenue Act of 1928 under which, as we have explained, an entirely different rule was prescribed. The same contention was made by the taxpayer in the *Rufus R. Rand, Jr.*, case, *supra*, and was rejected by the court. See page 10354, C. C. H., 1935, Vol. 3–A.

The argument of the petitioner (Br. 45–48) that she acquired property in 1924 by gift (made absolute in 1925) which she held for more than two years may prove confusing, unless it is remembered that the property so acquired in 1924 or 1925 was not the same property she sold in 1929. Prior to the distribution on November 3, 1927, the only property which the petitioner had by virtue of the gift was a right to a portion of her mother's one-

half interest in the decedent's estate, whatever that might be shown to be after settlement of the estate and on distribution of the assets. Prior to November, 1927, neither the petitioner nor her mother had any ownership of or right to the 1,000 shares of Radio stock, which is the property sold in 1929, or to any other specific asset of the estate not then actually distributed. When this fact is kept clearly in mind it is plain that the property here in question was not acquired and was not held, within the meaning of the statute, by the petitioner prior to the distribution of the stock to her on November 3, 1927.

The petitioner's argument appears to be that since the provisions of Section 101 (c) (8) were the same in the Revenue Acts of 1926, 1932, and 1934, as in the Revenue Act of 1928, here involved, it would be absurd to apply those provisions differently because of the change in the basis from that provided in Section 113 (a) (5). But, if Congress meant the sections relating to basis to be construed in conjunction with those relating to capital gains, as this Court said that it did in the *N. Y. Trust Co.* case, *supra,* it necessarily intended to establish a different rule, even though the general definition of "capital assets" remained the same in the several Acts. There is no reason why Congress may not change the operation of one section by changing another section to which it relates. We have pointed out that the establishment of a differ-

ent rule in the 1928 Act was the result solely of the confusion that existed under the earlier Acts. When that confusion was eliminated and the construction of the earlier Acts was settled by judicial decision in the *Brewster* v. *Gage* case, Congress in the 1934 Act merely reverted to the rule of the earlier Acts so that there might be uniformity in the provisions relating to the acquisition of property from a decedent's estate and the basis thereof for gain or loss. It is not apparent how the application of the provisions of the 1928 Act differently from corresponding provisions of the other Acts results in any absurdity, when the 1928 Act clearly prescribes a different rule from that established by the other Acts. See *Rufus R. Rand, Jr.* v. *Commissioner, supra.*

Nor does the construction of Sections 101 (c) (8) and 113 (a) (5) together to establish the date of acquisition for purposes of determining the period of holding, as we contend must be done, in anywise contravene or thwart the purpose of the capital gain provisions of the statute to stimulate sales and encourage profit taking. The impelling consideration for those provisions was that the gain subjected to taxation accrued over a period of years during which the property was held by the taxpayer. The taxable gain, however, is measured by the cost or other basis of the property to the taxpayer, which in the case of a general legatee is, under the 1928 Act, the value of the property at the time of distribution. Hence, the gain taxable to

the petitioner, who acquired the stock through her mother by intestacy, is only that amount accrued thereon from the date the stock was distributed to her and not the gain accrued from the date of the decedent's death. Whatever gain accrued between the date of death and the time of distribution is not taxable to the petitioner. The capital gain provisions were designed as a relief to only those taxpayers who bear the burden of the tax on the realized gain which accrued to the property over the specified period of years. Thus it is apparent that the construction of Sections 101 (c) (8) and 113 (a) (5) together, so that the date of acquisition for the purpose of establishing the basis also determines the period of holding the property, not only is far from inconsistent with the legislative purpose but indeed is essential to the accomplishment of the declared intent and purpose of the statute.

In this connection the court in the *Rand* case, *supra*, said (p. 10,354):

> If the taxpayer had held the property only during the tax year of realization, clearly there was no purpose in relieving him from any part of the regular tax. Congress had in mind the one situation of gain accumulated over a longer period. This it clearly expressed in the requirement that the property should be "held" for more than two years. Nor was Congress interested in accumulations which were not taxable to the taxpayer involved for such lay entirely outside its purpose in enacting the capital gains

rate. The only thing involved was accumulations of taxable gain *by the particular taxpayer*. Therefore, to give full effect to the purpose of 101 and, at the same time, to limit that section to its full purpose, the two-year period must be construed as controlled by the taxable gain provisions of section 113—unless (not true here) Congress has clearly expressed some other intention.

From the foregoing, we submit, it is clear that the petitioner's mother, who acquired her interest in the decedent's estate by intestacy, did not acquire the Radio stock, within the meaning of the applicable Revenue Act, until the distribution thereof on November 3, 1927, and held the same for income tax purposes only from that date. It necessarily follows, we think, that the petitioner, who derived *her right* to the stock by gift from her mother, did not acquire the stock until the distribution thereof to her on November 3, 1927, and held the same for income tax purposes only from that date, because obviously the petitioner could not have acquired the stock before her donor had acquired the same. While the gift of the portion of the mother's inchoate interest, by reason of which the petitioner became entitled to and received the stock, was made in 1925 prior to the date of distribution, the gift could not become effective to constitute acquisition of this particular stock by the petitioner within the meaning of the statute until distribution thereof from the estate. It is apparent, therefore, that because of the gift in 1925

of an inchoate and indeterminate interest in the decedent's estate the petitioner acquired the stock in question at the same time such stock was acquired by her mother, within the purview of the Revenue Act, so that for the purposes of this case it is unnecessary to consider independently the date of acquisition and period of holding by the mother. Hence, it is manifest that the result is the same in this case whether the petitioner be considered as having acquired the stock by gift from her mother or by intestacy direct from the decedent's estate. In either view, it must be concluded from what we have said that the petitioner acquired the stock in question on the date of distribution, November 3, 1927, and held the same only from that date within the meaning of the statute. It follows that the stock, having been sold in March, 1929, was held less than two years and the profit thereon is not a capital net gain taxable at the special rate, but ordinary net income taxable at the usual rates.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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APPENDIX

Statute and Other Authorities Involved

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the

basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.* —In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

> Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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